SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970

No. 1203

RAY FORD,

Petitioner,

v.

WISCONSIN REAL ESTATE EXAMINING BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

Theodore W. Hazen
1633 Racine Street
Racine, Wisconsin

Arthur P. Simmons
220 Ninth Street
Racine, Wisconsin

Nathaniel R. Jones
1790 Broadway
New York, New York 10019
Attorney for the Petitioner

Anne Gross Feldman
of Counsel

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WISCONSIN REAL ESTATE EXAMINING BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray for a writ of certiorari to review the judgment of the Supreme Court of Wisconsin entered in the above-entitled cause on October 2, 1970.

Opinions Below

The opinion of the Supreme Court of Wisconsin is reported at 48 Wis. 2d 91, 179 N.W. 2d 786 (1970), and is printed herein, *infra*, as Appendix A.

The opinion of the Circuit Court of Dane County is not reported and is printed herein, *infra*, as Appendix B.

The opinion of the Wisconsin Real Estate Examining Board is not reported and is printed herein, *infra*, as Appendix C.

Jurisdiction

The judgment of the Supreme Court of Wisconsin was entered on October 9, 1970. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3), petitioner having asserted in the courts below rights, privileges and immunities conferred by the Constitution and laws of the United States.

Questions Presented

1. Whether the Wisconsin Supreme Court's decision that the Wisconsin Real Estate Examining Board had no authority to discipline a licensed broker for practices that court found racially discriminatory constitutes state action of the character proscribed by the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the failure of the Wisconsin Real Estate Examining Board to discipline its licensed broker who engaged in racial discrimination by refusing to show listed real estate to the Negro petitioner solely because of petitioner's race, constitutes "state action" in violation of the equal protection requirements of the Fourteenth Amendment to the United States Constitution.

3. Whether the legislature of the State of Wisconsin has sanctioned racial discrimination by state licensed brokers in violation of the Equal Protection Clause of the Fourteenth Amendment by failing to grant its administrative body, the Wisconsin Real Estate Examining Board, specific authority to discipline brokers who engage in such discriminatory conduct.

Constitutional and Statutory Provisions Involved

1. This case involves the Thirteenth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Title 42 of the United States Code, Sections 1982 and 1983.

3. This case also involves relevant portions of Title 14, Chapter 136.08(2) of the Wisconsin Statutes, as set out below.

> Sec. 136.08(2) The commission may also on its own motion, or upon complaint in writing, duly signed and verified by the complainant, and upon not less than 10 days' notice to the broker or salesman, suspend any broker's or salesman's license or registration if it has reason to believe, and may revoke such license or registration as provided hereafter, if it finds that the holder of such license or registration has:
>
> (i) Demonstrated untrustworthiness or incompetency to act as a broker, salesman or cemetery salesman in such manner as to safeguard the interests of the public;
>
> (k) Been guilty of any other conduct, whether of the same or a different character from that specified herein, which constitutes improper, fraudulent or dishonest dealing;

Statement of Facts

On March 6, 1967, Ray Ford, a Negro resident of the City and County of Racine, Wisconsin, with his wife and infant child, visited the "Bud" Orth Real Estate Agency located in the City and County of Racine, Wisconsin, owned and operated by Ellsworth C. "Bud" Orth, licensed as a real estate broker by the Wisconsin Real Estate Examining Board since October 18, 1949 (R. 92, 103). Ford

asked Ken Orth, a licensed real estate salesman on duty at the Agency (R. 103, 142), to show him property listed with the Agency since December 8, 1966 (R. 143) owned by Donald and Joanne McMahon, located at 2608 Pinehurst Avenue, Racine, Wisconsin (R. 96).

The salesman, in the presence of Ford and his family, made a telephone call to persons he alleged were Mr. and Mrs. McMahon, and informed them that Ford, a Negro, wanted to see the property with a view to buying it (R. 152). After the phone call, the salesman informed Ford that the owner, McMahon, did not want the property shown to "colored" persons, and that Ford could not see the property because he was "colored" (R. 154, 213, 214). Thereupon, Ford told Ken Orth that he, Orth, was "discriminating" by refusing to show him property listed for sale with the agency and left (R. 161, 216). The salesman admitted that "other than the fact that they were members of the Negro race", Ford and his wife were "a very nice looking couple. They appeared to be perfectly respectable and neat" (R. 149-50).

"Bud" Orth felt that he is the largest real estate broker in the City of Racine, with listings for about 50 properties at the time of the refusal to show the McMahon property to Ford (R. 114). His listings are exclusive because the Orth Agency is not a member of the Multiple Listing Service of Racine Realtors Listing Exchange (R. 95). The property had been advertised for sale in the Racine-Journal Times newspaper by the Orth Agency (R. 95), and is located in an area in Racine, Wisconsin, in which few, if any, Negroes own property or reside (R. 101, 295). The written listing contract between the Orth Agency and the McMahons expressed no restrictions as to race (R. 109, 113). This racial restriction was not included on the written listing contract on advice of Orth's attorney (R. 111) although everyone in Orth's office was supposed to carry that instruction in his head (R. 113).

Al Orth, a licensed Orth Agency salesman, who took the listing on the McMahon property (R. 97, 313, 181), stated McMahon gave him oral instructions that the property was not to be shown to colored individuals (R. 314), although this was not made a condition of the listing with the Orth Agency (R. 311). Mr. McMahon stated that he issued this oral instruction without solicitation by Al Orth (R. 291, 292, 294). The Orth Agency, on its own initiative, kept a separate card file on listings, independent of the listing contracts, on which notations expressing restrictions as to race were kept (R. 118, 120, 356-58). Comments expressed on the card relating to the McMahon property, after Ford asked to see it and was refused, were to the effect that Ford was "colored" (R. 120).

Of the 50 listings in the Orth office at the time of the McMahon listing, between 15 and 20 involved instructions of the sellers that their homes were not to be shown to Negroes. If one of the salesmen was not sure, he would ask another salesman or call the owner directly and ask him. They knew generally as to the wishes of people with regard to selling to Negroes by the location of their property. If they were involved with a home toward the edge of town, it was more than likely that the people wouldn't choose to sell to Negroes. It was not uncommon for any Negro to walk into their office and be refused a home (R. 114-17).

Earl Zarbock, a broker formerly employed at the Orth Agency, stated that the file cards, recording listings subject to racial restrictions, were assembled by Mr. Orth, the owner of the agency, and bore his initials (R. 375-77). While an employee of the Orth office, Zarbock asked prospective sellers whether they would sell to "colored", because these were the implied instructions of Mr. Orth (R. 386, 389). "In certain areas of the city, it was a foregone conclusion that the property probably would not be sold to colored people" (R. 378) because it was in an all white neighborhood. "Mr. Orth would not want to feel

responsible for being the man to put a colored family in the neighborhood" (R. 379). "It was a feeling of the office to probably bend over backwards to stay out of trouble", and "it was considered trouble to sell to colored people" (R. 380).

Ford filed his Complaint with the Wisconsin Real Estate Examining Board on August 8, 1967, alleging in substance that E. C. "Bud" Orth, a licensed Real Estate Broker, had been guilty of racial discrimination as defined in Chapter 101.60(1)(b), Wisconsin Statutes, by virtue of his refusal to show Ford property listed for sale with the agency, solely because he was a Negro; that such discriminatory refusal constituted "incompetency" and "improper conduct" within the meaning and intent of Chapter 136.08(2)(i)(k), Wisconsin Statutes; and that the continued licensing of Orth as a real estate broker by the Wisconsin Real Estate Examining Board, notwithstanding Orth's racial discrimination, "incompetency", and "improper conduct", violated Ford's right to equal protection of the laws under *Section 1, Article 14 of the United States Constitution* and his inherent rights under *Article 1, Section 1 of the Wisconsin Constitution.* Ford asked that E. C. "Bud" Orth's real estate broker's license be suspended and revoked.

The Wisconsin Real Estate Examining Board thereafter held hearings on Ford's Complaint on September 18, 1967, and March 18, 1968, and issued its Findings of Fact and Conclusions of Law on May 14, 1968, as follows:

> "That in refusing to show the McMahon property to the Complainant Ford, the 'Bud' Orth Agency was acting as agent, under explicit instructions of the principal, McMahon, and was not guilty of discrimination constituting improper conduct and did not demonstrate incompetency in violation of Sec. 136.08 (2)(i) or (k) of the Wisconsin Statutes."

Thereupon, the Wisconsin Real Estate Examining Board dismissed Ford's Complaint. The Circuit Court of Dane County affirmed the findings of the Wisconsin Real Estate Examining Board and appeal was taken therefrom to the Supreme Court of the State of Wisconsin.

That court, after holding that the real estate broker was not insulated from liability under Title 42 of the United States Code, Section 1982, when it committed racial discrimination on behalf of the owner of the house by refusing to show property to the petitioner solely because of petitioner's race, nevertheless affirmed the judgment of the Circuit Court of Dane County on the grounds that the Examining Board was without statutory authority to revoke or suspend a real estate broker's license because it had indulged in racially discriminatory conduct. The court further held that the failure of the Wisconsin administrative agency to discipline licensed brokers for discriminatory practices would not constitute "state action" within the meaning of the Fourteenth Amendment.

Reasons for Allowance of the Writ

1. The Wisconsin Supreme Court by ruling that a State Agency, the Wisconsin Real Estate Examining Board, was without authority to revoke or suspend the license of real estate brokers guilty of overt racial discrimination, failed to recognize an established federal right and implicated the state in conduct proscribed by the Fourteenth Amendment and by 42 USC § 1982.

In concluding that the State Board was without authority to discipline its licensees for discriminatory acts, the court below failed to recognize its own role as an agency of the State, although it did give some consideration to whether the failure of the State legislature to specifically authorize sanctions against brokers who discriminated in regard to race was state action of a proscribed type (*infra*, p. 23).

The court, in finding that the real estate board was powerless to sanction licensed brokers who were unabashedly practicing racial discrimination against Negroes, unnecessarily constrained itself in its interpretation of the applicable statutory authority (Title 14, Chapter 136.08 (2i) and (k) of the Wisconsin Statutes). It relied only on several state cases in which the language of that statute had been interpreted under factual situations completely irrelevant to those at bar. *Lewis Realty* v. *Wisconsin Real Estate Brokers' Board*, 6 Wis. 2d 99, 94 N.W. 2d 238 (1959); *Sailer* v. *Wisconsin Real Estate Brokers' Board*, 5 Wis. 2d 344, 92 N.W. 2d 841 (1958); *Hilboldt* v. *Wisconsin Real Estate Brokers' Board*, 28 Wis. 2d 474, 137 N.W. 2d 482 (1965). In limiting itself to earlier cases which required a showing that before a broker's license could be revoked or suspended "untrustworthy," "morally culpable," and "unethical conduct" must be linked with violations of board's rules or with a financial injury to those affected by the broker's conduct, the court ignored its own view that:

> As an administrative agency of the State of Wisconsin, the Board not only has those powers to regulate which may be found to have been expressly granted to it [by the Legislature] or must *necessarily be implied* within the four corners of the statutes under which it operates. *American Brass Co.* v. *State Board of Health* (1944), 245 Wis. 440 15 N.W. 2d 27. (emphasis supplied). (Opinion below, appendix p. 17a).

By construing Chapter 136 as not authorizing disciplinary sanctions where a broker has acted in a racially discriminatory manner, the court below failed to recognize that the Board's "necessarily implied" powers logically construed should include authority to discipline its licensees where they have clearly deprived Negroes in the State of Wisconsin of a long recognized federal right:

> All citizens of the United States shall have the same right, in every State and Territory, as is en-

joyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property. 42 U.S.C. § 1982.

The Court's opinion travels only half of the required distance. It explicitly holds that under *Jones* v. *Mayer*, 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968) and § 1982, "A refusal to sell or rent property to a person solely because of his color naturally results in a violation of Section 1982, and a person making or assisting such a refusal [in this case the broker] should be responsible for such natural consequences" (opinion below, appendix p. 12a), but then retreats behind its narrow interpretation of the state statute to hold that although the Real Estate Board had erred in exonerating the broker, the Board would have been powerless to do anything about its licensees' unconstitutional acts. The logic of the court's own opinion dictates that having reversed the finding of the State Board, it should at least have remanded the case to it. (Since the Examining Board had assumed jurisdiction over petitioner's complaint in the first instance, it must have believed itself empowered to take some type of action if it had found racial discrimination had been practiced).

The court's mechanical reliance upon so-called state precedent is yet another example of the glaring internal inconsistencies found throughout its opinion. It found itself bound by "precedent" despite its recognition that "State Courts must conform to decisions of the United States Supreme Court as they are law on all matters involving a federal question *even though they overrule the established law of many State Courts.* McCartin v. Industrial Comm. (1946), 248 Wis. 570, 576, 22 N.W. 2d 522. (Emphasis supplied.)

Thus, the Wisconsin court's reliance upon earlier judicial interpretation of Chapter 136, was not only erroneous as a matter of stare decisis, but also failed to recognize

that these interpretations were made in cases which did not involve federal questions, and that under established rules of statutory interpretation a broader construction was required in a case where a fundamental constitutional right was at stake.

This Court's holding in *Jones* v. *Mayer*, *supra*, required the State court to interpret the language of Chapter 136 so that it will "conform to the decisions of this Court." Having specifically found that the action of the broker was violative of the holding in *Jones*, the State court was required to give a more liberal interpretation to the language of the state statute. Its failure to do so was unwarranted under the clear import of the statutory language with which it was dealing. It interpreted "untrustworthiness or incompetency to act as a broker in *such manner as to safeguard the interests of the public*" (emphasis supplied) so as to exclude racially discriminatory acts from their purview thus implying that "the interests of the public" did not include the Negro public.

Precedent found in other jurisdictions where similar statutory language was involved shows that the Wisconsin Court would not have been required to resort to a strained interpretation to find the requisite authority in the Board to sanction the offending broker. *Filippo* v. *Real Estate Commission of the District of Columbia*, 223 Atlantic 2nd 268 (D.C. CCA 1966) (racial discrimination by a broker demonstrated "unworthiness" to be licensed within the terminology of the statute); *Kamper* v. *Dent*, 26 A.D. 2d 697, 272 NYS 2d 808 aff'd 22 NY 2d 690, 238 N.E. 2d 194 (1968) (Secretary of State authorized to suspend broker's license for racial discrimination under statutory criterion of "untrustworthiness").

2. The failure of the State Court to construe the relevant statute so as to give substance to the federal right to be free from racial discrimination in acquiring property must also be viewed in light of the court's posture as a result of its decision.

It has long been beyond dispute that:

> A state may act through different agencies, either by its legislative, its executive or its judicial authorities; and that the prohibitions of the [14th] Amendment extend to all actions of the State denying equal protection of the laws, whether it be action by one of these agencies or another. *Commonwealth of Virginia* v. *Rives*, 100 U.S. 313, 318, 25 L.Ed. 667 (1880).

See also *Ex Parte Commonwealth of Virginia*, 100 U.S. 339, 25 L.Ed. 676 (1880); *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883); *Shelley* v. *Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) and cases cited therein at p. 15 n. 14, *Barrows* v. *Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953); *Evans* v. *Newton*, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed. 2d 373 (1966), *Peterson* v *Greenville*, 373 U.S. 244, 83 S.Ct. 1119, 10 L.Ed. 2d 323 (1963).

The vital question at issue here is whether the particular judicial action taken by the court below constitutes the type of "state involvement in an arbitrary discrimination . . . that it should be held responsible for the discrimination." *Peterson* v. *Greenville*, *supra*, (concurring opinion of Mr. Justice Harlan)

Judicial construction and enforcement by a state's highest court of the state's laws is the act of the state. *Twining* v. *New Jersey*, 211 U.S. 78, 90, 29 S.Ct. 14, 53 L.Ed. 97 (1908).

The decision below clearly places the state in the position of sanctioning continued racial discrimination by real estate brokers. Inasmuch as there was ample justification for the decision to have been otherwise, such an effect is not one the court was powerless to prevent. Where the court could have reached a conclusion which would have placed the power of the state *against* the continued practice of racial discrimination by its licensees, its failure to do so

must be viewed in terms of what the inevitable result of its contrary decision will be.

The effect on constitutional rights is the same as that struck down in *Evans* v. *Newton*, *supra*. There, Negroes were denied equal protection of the laws when they were denied access to a segregated park formerly operated by a municipality, when the Georgia courts actively involved themselves in appointing private individuals to operate the same park. Here, equal protection of the laws is denied members of the Negro race seeking housing as a result of the court's insistence on narrow construction of the statute.

The question of a permissible state neutrality versus unauthorized state action was considered by the Wisconsin court only in terms of the State legislature's failure to arm its administrative board with specific disciplinary powers over brokers who engaged in racial discrimination. It should also have turned its attention to the question of whether *its* decision constituted valid neutrality of invalid state action. Neutrality cannot be achieved by the court turning its back upon the obvious odious import of its ruling.

In addressing itself to the legislature's inaction, the court employed language well suited to analyzing its own role in this case. Citing *Reitman* v. *Mulkey*, 387 U.S. 369, 378, 87 S.Ct. 1627, 18 L.Ed. 2d 830 (1967), in connection with the standards to be employed in determining whether "the state *in any of its manifestations* has become significantly involved in private discriminations," the State Court stated:

> The language of the [Reitman] opinion goes on to indicate that the State Supreme Court is "armed" with knowledge of the facts and circumstances of the questioned activity, and must assess its potential impact in the milieu in which it will operate (opinion below, Appendix, p. 19a).

The record before the court provided ample evidence that unless officially and effectively rebuked by the State, the offending broker would continue to engage in systematic racial discriminatory practices. Petitioner's experience was clearly not an isolated one.

Ellsworth (Bud) Orth, the manager of the offending agency, the largest in Racine, testified before the Board that:

> Our attorney had earlier advised us how to handle the situation if sellers instructed us not to sell to colored people. . . . We made no written record of these instructions (R. 111-112).
>
> Of the 50 listings I had at the time of the McMahon listing, between 15 to 20 involved instructions of the sellers that their homes were not to be shown to Negroes. But there was no written record of that instruction. If one of our salesman was not sure he would ask another salesman or call the owner directly and ask him (R. 114).

The testimony was a graphic illustration of the racial zoning this brokerage firm helps perpetuate:

> If the property is located on Center Street, Grand Avenue or Franklin Street, in that area, it's likely the people will sell to Negroes. If we are involved with a home toward the edge of town, it's more likely the people won't choose to sell to Negroes. It's not uncommon for any Negro to walk into my office and be refused a home (R. 117).
>
> My salesmen have refused to show homes to members of the Negro race about five to ten times during the last year (R. 128).

Ken Orth, brother of Ellsworth [Bud] Orth, testified that after he advised petitioner he could not see the Orth home because he was a Negro:

> I told him we had some homes for sale on Franklin or Center Streets. When we have homes for sale on Franklin or Center Streets, we don't call the owners to see if they will sell to Negroes. (R. 154)

Donald McMahon, the seller of the house in question testified:

> I told Orth he could have the listing under one condition, that I would not sell to colored people . . . When he told Al Orth not to show or sell to colored people, he told us that was our right. (R. 311, 312)

Earl Zorbock, a real estate salesman formerly employed by Orth and now an owner of another agency in Racine, supplied evidence that the Orth Agency had habitually aided sellers to practice racial discrimination. He testified that during his employment:

> It was the feeling of the office to probably bend over backwards to stay out of trouble. It was considered trouble to sell to colored people, because possibly the agency would be known as a block busting organization. (R. 380)

Pointing out that he had not expected to testify, Mr. Zorbock explained his presence at the hearing:

> . . . because of my interest in the case and the *implications it would have on the industry as a whole.* (R. 386) (emphasis supplied)

That racial discrimination is often an integral part of the real estate business is beyond dispute. The United States Civil Rights Commission found:

> Property owners' prejudices are reflected, magnified and sometimes even induced by real estate brokers, through whom most housing changes hands. Organized brokers have with few exceptions, followed the principle that only a homogeneous neighborhood assures economic soundness . . . (Civil Rights U.S.A., Housing in Washington, D.C., U.S. Commission on Civil Rights 12-15 (1962) (cited by Justice Douglas in concurring opinion, *Reitman* v. *Mulkey, supra* at 381-2.)

Here, as in *Jones* v. *Mayer, supra*, a private seller has practiced overt racial discrimination. It has been aided in this illegal practice by State dicensed brokers, the legisla-

tive, administrative and the judicial arms of the state. A more direct involvement of the State in discrimination would be hard to find. Where a State Court acts in a manner which makes discrimination by private persons even potentially more effective than it has been previously, this is a form of state action which should not be countenanced under the Fourteenth Amendment.

It is ironic that if the only question before the court below had been the discriminatory behavior of the individual seller, a purely private act, it would have found itself with ample authority to prevent its continuance. But where it is asked to construe a state statute so as to stop what is clearly an institutionalized practice by brokers, affecting virtually any Negro who desires to move out of the ghetto, it finds both itself and the state body charged with regulating these brokers powerless. It does not even offer the Real Estate Board an opportunity to interpret its own enabling statute. Nor does it explore the question of why the Board entertained the complaint if it was powerless to act upon it. Instead, the court lightly slapped the wrist of the offending broker, but left it and others in the field free to continue engaging in conduct which by any natural reading of the statutory terms is "morally culpable", and "unethical", so long as no financial injury results to the person who is the victim of that conduct. The decision gives brokers practicing racial discrimination freedom to do so openly. They may even urge such practices upon sellers without fear of state reprisal.

The result—intended or thoughtless—negates the federal constitutional and statutory rights to be free from *all* racially discriminatory practices in the sale or purchase of property and ignores the State's duty to enforce this right through the remedies available to it. *Sullivan* v. *Little Huntington Park*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed. 2d 386 (1969).

It is the solemn responsibility of the judiciary to "fashion a remedy" for the violation of a right

> *which is truly "inalienable" in the event that no remedy has been provided* by a legislative enactment. *An inherent right will be upheld by this Court against action by any person or department which would destroy such a right or result in discrimination in the manner in which enjoyment thereof is to be permitted as between persons of different races, creeds or color.* Colorado Anti-Discrimination Commission v. Case, 151 Col. 235, 380 P. 2d 34, 40 (1962) (emphasis supplied)

It is thus a matter of grave, public importance that this Court grant certiorari so that it may determine whether the failure of the highest court in the state to find authority to order the Wisconsin Real Estate Examining Board to revoke or suspend the license of a racially discriminatory real estate broker is state action of the character making it responsible for the discrimination.

3. Although the court below specifically found that racial discrimination by real estate brokers was within the purview of the Equal Protection Clause, this Court has not yet made that pronouncement. Indeed in *Jones* v. *Mayer, supra*, it specifically declines to rule on the question of whether brokerage services were within the purview of either §§ 1981 or 1982 stating only that the terms of that statute do "not refer explicitly to discrimination . . . in the provision of brokerage services" (392 U.S. at 413 n. 10).

In *Reitman, supra*, Mr. Justice Douglas' concurring opinion makes the argument that brokerage services are sufficiently imbued with the public interest to warrant their inclusion under the Fourteenth Amendment protection:

> There is no difference, as I see it, between a state authorizing a licensee to practice racial discrimination and a state, without any express authorization of that kind nevertheless launching and countenancing the operation of a licensing system in an environment where the whole weight of the system is on the side of discrimination. In the latter situation the

> state is impliedly sanctioning what it may not do specifically. . . . Since the real estate brokerage business is state regulated and since it is state licensed, it must be dedicated, like the telephone companies and the carriers and the hotels and motels to the requirements of service to all without discrimination—a standard that in its modern setting is conditioned by the demands of the Equal Protection Clause of the Fourteenth Amendment.

Congress has recently given recognition to the vital part real estate brokers play by enacting the Fair Housing Act of 1968 (42 USC §§ 3601 *et seq.*) which, inter alia, prohibits discriminatory behavior on the part of brokers.

The times dictates that this Court should place its authority behind a similar view. This case provides opportunity for it to do so. If discriminatory practices by brokers are interdicted by the Fourteenth Amendment, the words of the Federalist No. 15 are most apposite:

> It is essential to the idea of a law that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation.

4. The failure of the Wisconsin Real Estate Examining Board to discipline its licensed broker for engaging in racial discrimination by refusing to show listed real estate to the Negro petitioner solely because of petitioner's race, constitutes "state action" in violation of the equal protection requirements of the Fourteenth Amendment to the United States Constitution. By not sanctioning its racially discriminatory licensee broker, the Examining Board, in effect, tacitly encouraged the continuation of such conduct by assuring the broker that no penalties will ensue if he continues to operate in the same pattern. When an arm of the state, by its failure to act, allows racial discrimination

to continue, the state, through its responsible administrative arm, "has become a joint participant in a pattern of racially discriminatory conduct by placing itself in a position of interdependence with private individuals [its licensees] acting in such a manner." *Ethridge* v. *Rhodes*, 268 F. Supp. 83, 87 (S.D. Ohio 1967).

An administrative body "cannot avoid the responsibilities imposed on it by the Fourteenth Amendment by merely ignoring or failing to perform them," *Ethridge* v. *Rhodes, supra.* In the case at bar, the Board's conduct falls squarely within the proscription of the Amendment's command that "no state shall deny to any person within its jurisdiction the equal protection of the laws . . . through any arrangement . . ." *Cooper* v. *Aaron*, 358 U.S. 1, 9, 16, 78 S.Ct. 1401, 3 L.Ed. 2d 5 (1958).

In *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed. 2d 45 (1961), this Court found prohibited "state action" where an agency of the State of Delaware which owned and operated a building merely leased space for a restaurant therein to an individual who refused to serve blacks. The Court held the state responsible, in part, because as lessor *it could have insisted on preventing discrimination and failed to do so.* The Court said at page 725:

> [T]he Authority could have affirmatively required Eagle [the lessee] to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be . . . *By its inaction . . . the State* . . . has not only made itself a party to the refusal of service, but *has elected to place its power, property and prestige behind the admitted discrimination.* (emphasis supplied)

That a state may become involved in constitutional prohibited conduct by inaction as well as by affirmative acts is clear. *Catlette* v. *United States*, 132 F.2d 902 (4th Cir. 1943), involved a police officer who allowed a mob to assault a group of Jehovah's Witnesses. In upholding his conviction, the court addressed itself to the concept of "state action" under the Fourteenth Amendment, stating at page 907:

> It is true that a denial of equal protection has hitherto been largely confined to affirmative acts of discrimination. The Supreme Court, however, has already taken the position that culpable official state inaction may also constitute a denial of equal protection. McCabe v. Atchison, T. & S. F. Ry. Co., 235 U.S. 151, 35 S. Ct. 69, 59 L. Ed. 169; State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 59 S. Ct. 232, 83 L. Ed. 208.

Similarly in *Lynch* v. *United States*, 189 F.2d 476 (5th Cir. 1951), *cert. denied* 342 U.S. 831, 72 S. Ct. 50, 96 L. Ed. 629 (1951), a case involving police failure to protect Negroes from mob violence, the Court stated:

> There was a time when the denial of equal protection of the laws was confined to affirmative acts, but the law now is that culpable official inaction may also constitute a denial of equal protection. It is equally true as can be seen in all the relevant precedent that the line of demarcation between state action and inaction is extremely thin. This is precisely why the effect of the state's involvement upon racial discrimination becomes so important.

The wellspring of the real estate broker's right to sell property is its state license. *Hilbodt* v. *Wisconsin Real Estate Brokers Board*, *supra* at 481. Where a licensee engages in discriminatory practices and these practices are brought to the attention of the agency charged with regulating the licensee, that agency's action or non-action vis a vis these practices becomes state action, answerable to the dictates of the 14th Amendment.

As has been seen, the right to be free from racial discrimination in the rental and purchase of housing is a matter of national as opposed to purely local concern. It involves federally granted constitutional rights as opposed to rights purely local in nature. The Examining Board's strained attempt to exonerate the broker through a misapplication of common law rules of agency in direct conflict with the evidence before it places it considerably beyond the pale of state "neutrality" alluded to by the Court in *Reitman* v. *Mulkey, supra* at 374, 375. Any fair interpretation of "neutrality" denotes an impartial indifference and non-engagement, a passive absence of action one way or the other. The decision of the Examining Board hardly falls within that definition. That Board apparently did not see its obligation as a state agency as at all involved with the question of assuring that constitutional rights not be transgressed by those it was charged with regulating. It is significant that it at no time adopted any rules aimed at placing the brokers whose conduct it was charged with regulating on notice that discriminatory acts would not be countenanced. Despite the undisputed evidence before it that the brokerage firm, as a matter of policy, aided and abetted sellers in their desire to discriminate against Negroes, the Examining Board accepted at face value its claim that it was only acting as an agent of the seller. It thus never reached the question of its power to discipline a broker who it might find acted discriminatorily on its own, although its willingness to entertain the complaint indicates it believed it had such authority.

Federally granted constitutional rights cannot be rendered worthless because a state duty to vindicate those rights is ignored by the state administrative agency. For an agency, which by definition should be expert in the area of real estate practices, the Examining Board's naivetee is astounding. Its decision evinces, at best, a total indifference to what is widely recognized as a common practice

among real estate brokers. See *e.g.*, Civil Rights U.S.A., Housing in Washington, D. C., U.S. Commission on Civil Rights (1962); Housing, U.S. Commission on Civil Rights (1961).

Even if the Wisconsin Real Estate Examining Board did not intend to sanction racially discriminatory practices among state licensed real estate brokers, its decision here had the clear effect of condoning practices and conduct by real estate brokers which violate constitutional rights.

While the failure of the Examining Board to discipline its licensee does not, on its face, *expressly* authorize or encourage private discriminations, ". . . the reality is that the impact falls on the [racial] minority," in a discriminatory fashion. *Hunter* v. *Erickson*, 393 U.S. 385, 391, 89 S. Ct. 557, 21 L. Ed. 2d 616 (1969). By failing to invoke disciplinary sanctions against brokers who refuse to render their services to an individual solely because of his race and by hiding behind an unsupportable analysis of the facts before it, the State agency has selected to place the power and prestige of the State behind admitted racial discrimination.

If the Examining Board's treatment of these practices is left undisturbed—and this is clearly the import of the decision below—the effect is to give carte blanche to similar practices by other brokers who will feel confident that regardless of the federal unconstitutionality of racially discriminatory conduct on their part, they may safely continue to indulge in it because the State will not actively seek to stop them. It is thus a matter of extreme importance that this Court grant certiorari so that the implications of the agency's decision herein can be carefully considered.

5. Assuming, *arguendo*, that there is no authority, expressed or implied, in relevant Wisconsin Statutes under which the Wisconsin Examining Board could have disciplined a broker for racial discrimination, the conscious

consideration and refusal by the State legislature to empower its agency to penalize state licensed violators of federal constitutional rights constitutes "state action," violative of the Fourteenth Amendment.

In *Reitman* v. *Mulkey, supra* at 378 this Court stated:

> This Court has never attempted the "impossible task" of formulating an infallible test for determining whether the state "in any of its manifestations" has become significantly involved in private discrimination. "Only by sifting facts and weighing circumstances" on a case-by-case basis can a non-obvious involvement of the State in private conduct be attributed its true significance. *Burton* v. *Wilmington Parking Authority* . . .

The Wisconsin Legislature's rejection of Substitute Amendment 1.A, Assembly Bill 413 (1965) which would have specifically authorized the Examining Board to impose sanctions on brokers guilty of racially discriminatory practices is state action which smacks of *interposition, interdiction,* and *nullification.* Having created a special body to assure that real estate brokers function in the public interest, the Legislature should have given that body the power to make sure that they function in a non-discriminatory manner.

This Court held in *Jones* v. *Mayer, et al, supra* at 413, that 42 USC § 1982 barred "all racial discrimination, *private as well as public,* in the sale or rental of property." There is thus a duty imposed upon private individuals to refrain, and a corresponding duty on States to restrain deprivations of that right. The Wisconsin Supreme Court construed the consideration and rejection by the Wisconsin legislature of a measure granting authority to the Examining Board to restrain such deprivations by its licensed deputies (brokers) as a permissible expression of a state public policy of "neutrality" on the subject (opinion below, appendix p. 20a). However, a State may not, under guise

of "neutrality," handcuff its administrative bodies so they are powerless to restrain violations of federally protected rights. While the State legislature may not have chosen to expressly grant citizens the right to acquire property free from racial discrimination, it has no right to inhibit those rights when they do exist on the federal level.

The Wisconsin Supreme Court apparently recognized the vulnerability of Wisconsin on this question, since it warned the Legislature in a footnote to its opinion (footnote 4, appendix, p. 17a):

> In view of the decision of the United States Supreme Court in 1968 in *Jones* v. *Mayer Co., supra,* and the Fair Housing Act of 1968 passed by Congress, the legislature may want to reconsider its position as to discrimination in the sale or rental of property.

Even if the State legislature did not intend to render its administrative agency powerless to deal with racial discrimination practiced by its licensees, its lack of intent cannot save it from a finding that by its failure to grant the agency the requisite power, it has participated in racial discrimination. In *Norwalk Core* v. *Norwalk Development Agency*, 395 F.2d 920, 931 (2nd Cir. 1968), the Second Circuit stated:

> [T]he fact that the discrimination is not inherent in the administration of the program, but is . . . "accidental to the plan." Surely does not excuse the planners. . . . Equal protection of the laws means more than merely the absence of governmental action designed to discriminate; as Judge J. Skelly Wright has said, "we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and public interest as the perversity of a wilful scheme." *Hobson* v. *Hansen*, 269 F.Supp. 401, 497 (D.D.C. 1967).

Again, although the Wisconsin legislature may not have intended to sanction racially discriminatory practices among state licensed real estate brokers, it is certainly guilty of "arbitrary thoughtlessness" in establishing an agency to regulate the practices and conduct of real estate brokers and failing to give that agency the authority to control their conduct where it violates constitutional rights.

Certainly "it is of no consolation to an individual denied the equal protection of the laws that it was done in good faith." *Burton* v. *Wilmington Parking Authority, supra* at 725. The Legislature should not be excused for its legislative omissions where the effect of such omissions is to "countenan[ce] the operation of a [state] licensing system," which allows racial discrimination, "in an environment where the whole weight of the system is on the side of discrimination." *Reitman* v. *Mulkey, supra* at 385 (concurring opinion of Justice Douglas). This is particularly so "given the recognized importance of equal opportunities in housing," *Southern Alameda Spanish Speaking Organization* v. *City of Union City, California*, 424 F.2d 291, 295 (9th Cir. 1970), and the acknowledged fact that "urban housing, like restaurants, inns, and carriers [citations omitted], or like telephone companies, drugstores or hospitals, is affected with a public interest in the historic and classical sense [citations omitted]." *Reitman* v. *Mulkey, supra* at 385, 386 (concurring opinion of Justice Douglas).

In *Buchanan* v. *Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917), this Court declared invalid a municipal ordinance restricting occupancy in designated areas to persons of specified race and color as denying the constitutional rights of white sellers and Negro purchasers of property. The Court said at page 79:

> The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire prop-

> erty without state legislation discriminating against him solely because of color.

The State legislation in *Buchanan* was racially discriminatory on its face. The effect of the legislature's rejection of Substitute Amendment 1. A and its failure to enact an equivalent thereto is racially discriminatory in effect. It sanctions continued residential segregation maintained through widely recognized practices of real estate brokers. By regulating conduct of real estate brokers only insofar as it causes financial injury and refusing or neglecting to regulate racially discriminatory practices among brokers, the legislature has sanctioned the continuance of a situation which it could not have authorized in the first instance. *Buchanan* v. *Warley, supra.*

The Court below indicated in its discussion of "agent liability" that a real estate agent is not by virtue of an agency relationship insulated from liability under Title 42 U.S.C. Section 1982, and that "whenever a person is denied the right to purchase [property] solely because he is a Negro, a violation of Section 1982 has occurred, no matter what the underlying motivation might have been." (Opinion below, Appendix p. 11a.)

Justice Douglas spoke to this point in his concurring opinion in *Reitman, supra* at 381, 382. He stated:

> *Real estate brokers . . . are largely dedicated to the maintenance of segregated communities.* Realtors commonly believe it is unethical to sell or rent to a Negro in a predominantly white or all white neighborhood. (Emphasis supplied.)

The record below is ample evidence of the truth of this conclusion. Legislative inaction in this area, rather than being neutral, "translate[s] private prejudice," *Reitman* v. *Mulkey, supra* at 383 (Justice Douglas concurring opinion), into discriminatory state action, a result which cannot be justified.

It is thus a matter of grave public importance that this Court grant *certiorari* so that it may determine the extent to which a state may, by its omissions or inactions, involve itself in the racially discriminatory policies and practices of its licensed real estate brokers.

CONCLUSION

Wherefore, for the reasons herein above stated, it is respectfully submitted that this petition should be granted.

THEODORE W. HARRIS
1633 Racine Street
Racine, Wisconsin

ADRIAN P. SCHOONE
220 Ninth Street
Racine, Wisconsin

NATHANIEL R. JONES
1790 Broadway
New York, New York 10019
Attorney for the Petitioner

ANNE GROSS FELDMAN
of Counsel

Certificate of Service

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

No.

RAY FORD,

Petitioner,

against

WISCONSIN REAL ESTATE EXAMINING BOARD,

Respondent.

NATHANIEL R. JONES, a member of the bar of this court, does hereby certify that copies of the above-entitled Petition For A Writ Of Certiorari were served on Robert Warren, Attorney General, State of Wisconsin, State Capitol Building, Madison, Wisconsin and Fritchler, Pellino & Protzmann, 222 South Hamilton Street, Madison, Wisconsin 53703, to the Attention of Mr. John C. Fritchler, by depositing the copies in the United States mails, prepaid, first class, airmail, addressed to them, as set forth above, on January 6, 1970.

NATHANIEL R. JONES
General Counsel
N.A.A.C.P.
1790 Broadway
New York, New York 10019
Attorney for the Petitioner

APPENDIX A

(Opinion, Supreme Court of Wisconsin, October 9, 1970)

BEILFUSS, *Judge*:

The complainant, Ray Ford, filed a complaint with the Wisconsin Real Estate Examining Board[1] asking that the real estate broker's license of the "Bud" Orth Real Estate Agency be revoked or suspended because of alleged racial discrimination on the part of the Orth Agency.

On March 6, 1967, complainant-appellant, a Negro, visited the "Bud" Orth Real Estate Agency located at 1680 Douglas Avenue in Racine, Wisconsin, accompanied by his wife and infant child. The agency is owned and operated by Ellsworth C. "Bud" Orth, a licensed real estate broker since 1949, and the agency's listings are exclusive since it is not a member of the Multiple Listing Service of the Racine Realtors Listing Exchange. Mr. Ford asked Ken Orth, a licensed salesman on duty at the agency, to show him a particular piece of property listed with the agency since December of 1966, and advertised for sale in the Racine Journal-Times newspaper. The property was owned by Donald and Joanne McMahon, and located at 2608 Pinehurst in Racine, an area of the city in which few, if any, Negroes owned property or resided.

Ken Orth, in the presence of Ford and his family, made a phone call to the McMahons informing them that Ford wanted to look at the property as a prospective purchaser and that he was a Negro. After the telephone call Orth informed Ford that the owner did not want to show the property to colored persons and therefore he could not see it. Ford told Ken Orth that he was discriminating and left the agency. Ken Orth testified that Ford and his wife were

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[1] For purposes of this opinion the functions and duties of the Wisconsin Real Estate Examining Board (*see* secs. 15.01, 15.08, 15.405(11), Stats.) and the Wisconsin Real Estate Commission as defined in ch. 136 will be considered to be the same.

a very nice looking couple and appeared to be perfectly respectable and neat.

The property was advertised for sale at $14,900, with $450 down. Ford had saved $1,700 and his wife earned $168 every two weeks.

The written listing contract between the Orth Agency and the McMahons expressed no restrictions as to race on showing the property. When there were such restrictions concerning particular property everyone in the office was supposed to carry the instructions "in his head." It appears from the record that prior to this time notations were made in the office card file as to whether or not particular pieces of property could be shown or sold to Negroes, but that the agency stopped this practice on the advice of its attorney. At the time in question there were about 50 listings being handled by the agency and between 15 to 20 involved instructions of the sellers that their homes were not to be shown to Negroes. If one of the salesmen was not sure whether a particular piece of property could be shown he would ask another salesman or call the owner and ask him.

The listing on this particular property was taken by Al Orth, another licensed salesman. He testified that McMahon gave him oral instructions that the property was not to be shown to Negroes. McMahon testified that he gave the instruction without any solicitation by Al Orth. McMahon stated that they made an oral agreement that it would not be shown to Negroes and that he made this a condition of his giving the listing, but later his testimony equivocates this to some degree.

On August 7, 1967, Ford filed a complaint with the Wisconsin Real Estate Examining Board alleging in substance that E. C. "Bud" Orth, a licensed broker, was guilty of racial discrimination as defined in s. 101.60 (1)(b), Stats., by refusing to show him property listed for sale with the agency solely because he was a Negro, and that such con-

duct constituted "incompetency" and "improper conduct" within the meaning and intent of sec. 136.08(2)(i) and (k), Stats. Further, he charged that the continued licensing of Orth, notwithstanding such conduct, violated Ford's right to equal protection of the laws under art. XIV, sec. 1 of the United States Constitution, and his inherent rights under art. I, sec. 1 of the Wisconsin Constitution. He asked that Orth's license be suspended and revoked.

The board held two hearings and dismissed the complaint, concluding that Orth was acting as agent under the explicit instructions of his principal and was not guilty of discrimination or of conduct in violation of sec. 136.08(2)(i) or (k), Stats. The circuit court for Dane county affirmed the findings of the board and this appeal was taken by Ford.

BEILFUSS, *J.* The parties[2] have formulated and argued three questions:

1. Is a real estate broker guilty of racial discrimination in refusing to show property listed with him to Negroes pursuant to the unsolicited oral instructions of the property owner when such instruction were agreed to by the broker at the time the listing contract was made?

2. Does racial discrimination by a licensed real estate broker constitute "incompetency," "improper dealing," or "untrustworthiness" within the meaning, intent, and purpose of sec. 136.08(2)(i) and (k), Stats., so as to authorize suspension or revocation of his license by the Wisconsin Real Estate Examining Board?

3. Does the decision of the Wisconsin Real Estate Examining Board that such conduct by a licensed broker is

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[2] The Bud Orth Real Estate Agency, although served, did not appear in the action in the circuit court to review the order of the examining board and does not appear on this appeal.

not racial discrimination constitute state action so as to deny Negroes the equal protection of the law guaranteed by art. XIV, sec. 1 of the United States Constitution, and art. 1, sec. 1 of the Wisconsin Constitution?

The appellant Ford initially argues that Orth's refusal to show him the property falls squarely within the definition of racial discrimination as set forth in sec. 101.60(1)(b), Stats., which reads:

> "'Discriminate' and 'discrimination' mean to segregate, separate, exclude or treat any person unequally only because of race, color, religion, national origin or ancestry. It is intended that the factors set forth herein shall be the sole bases for prohibiting discrimination."

Orth's conduct does fall within this broad definition but it was not actionable under that chapter. Sec. 101.60(1)(a) 1., Stats., states that "housing" within the meaning of that section does not include:

> "Any building or structure containing living quarters occupied or intended to be occupied by no more than one family and which is used by or was last used by the owner thereof as a bona fide residence for himself and any members of his family forming his household."

Further, sec. 101.60(3), Stats., provides in part: "This section shall be administered by the industrial commission [3] through its equal opportunities division. . . ." This proceeding is clearly before the real estate examining board under the directives of ch. 136.

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[3] Now Department of Industry, Labor & Human Relations.

Appendix A

Appellant also predicates discrimination by Orth on a federal substantive right established by 42 USCA, p. 193, sec. 1982, which provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

In order to sustain a cause of action under this section one must prove that he has been deprived of the "same right . . . to purchase . . . real . . . property" as is enjoyed by white citizens. He must also show that he has been denied the opportunity to purchase property on the basis of his race. If there has been such a denial then a cause of action arises under sec. 1982. (There may be several legitimate reasons which justify an owner in not selling or renting his property to a particular person whether he is white or black.)

This nondiscriminatory right is conferred by federal law and is not dependent on state law. *Bush* v. *Kaim* (D. C. Ohio, 1969), 297 Fed. Supp. 151.

Previously, 42 USCA, sec. 1982 was thought to bar only discrimination which was the product of state action and that it did not reach private discrimination. *See Hurd* v. *Hodge* (1948), 334 U.S. 24, 68 Sup. Ct. 847, 92 L. Ed. 1187. However, in June of 1968, the United States Supreme Court decided the landmark case interpreting sec. 1982, *Jones* v. *Mayer Co.* (1968), 392 U.S. 409, 88 Sup. Ct. 2186, 20 L. Ed. 2d 1189, which held the statute prohibits private discrimination as well as public.

In *Jones, supra*, the petitioners filed a complaint in Federal District Court alleging that the respondents had refused to sell them a home in a St. Louis county, Missouri community solely because the petitioners were Negroes. Relying in part on sec. 1982, the petitioners sought an injunctive and other relief. (Jurisdiction was invoked under

28 USCA, pp. 202, 203, sec. 1343(4), providing for "damages . . . equitable or other relief under any Act of Congress providing for the protection of civil rights.") The district court dismissed the complaint and the Eighth Circuit Court of Appeals affirmed, concluding that sec. 1982 applied only to state action and did not reach private refusals to sell. The Supreme Court granted certiorari and the precise issue it considered was whether sec. 1982 barred all racial discrimination or merely that which was the product of state action. The court stated, at p. 413:

> "We hold that sec. 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment."

The court also considered the relationship between sec. 1982 and the "Fair Housing Act of 1968" (42 USCA, p. 686, sec. 3601 *et seq.*). It found that the Acts have independent significance and that the exemptions in the 1968 Act are not applicable under the 1866 Act (sec. 1982). It stated at pp. 416, 417: "Its enactment [Civil Rights Act of 1968] had no effect upon sec. 1982 and no effect upon this litigation. . . ."

The standard established in *Jones*, *supra*, would appear to be simple. At p. 421, the court said:

> "So long as a Negro citizen who wants to buy or rent a home can be turned away simply because he is not white, he cannot be said to enjoy 'the same right . . . as is enjoyed by white citizens . . . to . . . purchase [and] lease . . . real and personal property.' 42 U.S.C. sec. 1982. (Emphasis added.)"

At the beginning of its opinion the Supreme Court stated what sec. 1982 does not encompass. At p. 413 it said: "It

does not refer explicitly to discrimination . . . in the provision of brokerage services." In its brief and oral argument respondent cited this quotation in an attempt to show that *Jones* is not applicable to the instant facts. It is submitted that respondent has taken this quotation out of context. The footnote [10] to the quoted language, at pp. 413, 414, states:

> "Contrast sec. 806. In noting that 42 U.S.C. sec. 1982 differs from the Civil Rights Act of 1968 is not dealing explicitly and exhaustively with such matters . . . we intimate no view upon the question whether ancillary services or facilities of this sort might in some situations constitute 'property' as that term is employed in sec. 1982. . . ."

The court was talking about whether brokerage services themselves could be considered property which could unlawfully be withheld in violation of sec. 1982, not that a broker was exempt from sec. 1982 when acting for another person, as respondent seems to argue.

We conclude from the facts before us that the action of the owner in this case, McMahon, would have been unlawful under 42 U.S.C.A., sec. 1982. In their briefs the parties assume that such a violation is a tort and this fact is essential to support appellant's theory that the agent is also responsible.

> "Broadly speaking, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages. . . But even this vague statement is inaccurate in one respect, since one important form of remedy for a tort is an injunction, granted in a court of equity, before any damage occurs, . . . But the availability of all such remedies will depend in the first instance upon the possibility that an action for damages would lie for the wrong thus averted, . . ."

Appendix A

Prosser, *Law of Torts* (3d ed. hornbook series), p. 2, sec. 1.

"But in all such cases it is solely by virtue of the right to damages that the wrong complained of is to be classed as a tort.' Salmond, Law of Torts, 12th Ed. 1957, 9." Prosser, *supra*, footnote 6, p. 2.

Clearly, 42 U.S.C.A., sec. 1982, does create a right and corresponding duty. Although it is couched in declaratory terms, *Jones* v. *Mayer Co.*, *supra*, specifically held that it could be enforced by injunction, but reserved the question as to whether an aggrieved party might assert an implied right to compensatory damages. *See* footnote 14 in *Jones*, at pp. 414, 415.

The only other significant authority construing sec. 1982 did consider the question of damages. In *Sullivan* v. *Little Hunting Park* (1969), 396 U.S. 229, 90 Sup. Ct. 400, 24 L. Ed. 2d 386, the court held that the action of a community recreational corporation in refusing to approve the assignment of a membership share from a member to his lessee, a Negro, was an interference with that lessee's right and violated 42 U.S.C.A., sec. 1982. It also held that the corporation could not legally expel the white member for advocating the cause of the Negro, and that he had standing to sue for an injunction and monetary damages. In discussing damages under sec. 1982, the court said, at pp. 238, 239:

"Finally, as to damages, Congress, by 28 U.S.C. sec. 1343 (4), created federal jurisdiction for 'damages or . . . equitable or other relief under any Act of Congress providing for the protection of civil right. . . .'

". . .

"The existence of a statutory right implies the existence of all necessary and appropriate rem-

edies. [Citations omitted.] As stated in *Texas & Pacific R. Co.* v. *Rigsby*, 241 U.S. 33, 39:

> "'disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied. . . .'"

The construction given to federal statutes by federal courts is conclusive on the state courts. *Elmendorf* v. *Taylor* (1825), 23 U.S. 152, 160 L. Ed. 289; *In re Oconto County State Bank* (1942), 241 Wis. 369, 6 N.W. 2d 353, 7 N.W. 2d 602. "State courts must conform to decisions of the United States Supreme Court as they are law on all matters involving a federal question even though they overrule the established law of many state courts." *McCartin* v. *Industrial Comm.* (1946), 248 Wis. 570, 576, 22 N.W. 2d 522. Based upon the holdings that sec. 1982 does create a right and duty between private individuals, and that a violation of that right does give use to an implied right to compensatory damages, it would appear that a violation of sec. 1982 may be classified as a tort.

As both parties agree, the law of agency does not insulate an agent from liability for his torts, whether done of his own volition or on behalf of his principal. Restatement, 2 *Agency* (2d), p. 105, sec. 343, reads:

> "An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal, except where he is exercising a privilege of the principal, or a privilege held by him for the protection of the principal's interests, or where the principal owes no duty or less than the normal duty of care to the person harmed."

Appendix A

The Restatement rule was cited and approved by this court in *Purtell* v. *Tehan* (1966), 29 Wis. 2d 631, 639, 139 N.W. 2d 655.

The essential and basic feature underlying the relation of a broker to his employer is that of agency, and the principles of the law of agency apply throughout. 12 Am. Jur. 2d, *Brokers*, p. 795, sec. 30. Respondent is correct in its contention that a broker must act in conformity with his authority and instructions and is responsible to his principal if he violates this duty, but clearly an agent is not liable for failure to obey instructions to perform acts which are illegal. 3 Am. Jur. 2d, *Agency*, p. 585, sec. 266; 3 C.J.S., *Agency*, p. 32, sec. 152; Restatement 2 *Agency* (2d), p. 264, sec. 411.

Respondent argues that sec. 343 of the Restatement is not applicable here since Orth's conduct did not constitute an "act otherwise a tort" under that section. This is predicated on the fact that he had no right to show or sell the property without the owner's consent which was admittedly withheld. In effect, Orth says he could not be guilty of a tort for refusing to do something since he could not have done it even if he had wanted to. This argument would be completely valid if Orth had taken the listing without any conditions or agreements and was prevented from showing the property to a Negro because McMahon refused to allow it. But the record here indicates that Orth entered the agency agreement with an oral agreement that he would not show the property to Negroes. Orth agreed to and ultimately did assist his principal in the commission of a tort. Comment *d* to sec. 343 of Restatement, 2 *Agency* (2d), p. 106, states: "An agent who assists another agent or the principal to commit a tort is normally himself liable as a joint tort feasor for the entire damage."

Respondent argues that Orth did not perform any independent or discretionary act leading to its inability to show the property to Ford. But he was offered the listing on

the condition that he agree not to show i tto Negroes. He was free to accept or reject the offer. He was not ignorant of the implications of the agreement since he testified that such conditions were not written into his records on the advice of his attorney. At that point he independently and voluntarily agreed to assist the owner in a violation of 42 USCA, sec. 1982, if the situation arose, and ultimately did so when Ford requested to see the property.

Respondent also argues that nothing in the record shows Orth's refusal was racially motivated. Apparently the assumption must be that his agreement to refuse to show it to a Negro was economically motivated, he did not want to lose the listing. But a distinction may be drawn between a discrimination made on the basis of race, *i.e.*, the standard by which it is made regardless of motivation, and a discrimination that is racially motivated, *i.e.*, the reason of it is made. *Jones* v. *Mayer Co.*, *supra*, we believe, is broad enough to hold that whenever a person is denied the right to purchase solely because he is a Negro a violation of sec. 1982 has occurred, no matter what the underlying motivation might have been.

Concerning the question of motive, consideration might be given to the trend of decisions involving suits under 42 USCA, sec. 1983, civil actions for deprivation of rights under color of state law. Clearly the emphasis there is to read the Civil Rights Act against the background or tort liability which makes a man responsible for the natural consequences of his own actions. It seems inconsistent to say that a man is responsible for the natural consequences of his actions and then require that those actions be improperly motivated. If an essential element of the tort itself is an improper motive, such as in malicious prosecution, then that element must be shown. But its necessity is found in the common law of tort, not in the Civil Rights Act. See *Monroe* v. *Pape* (1961), 365 U.S. 167, 81 Sup. Ct. 473, 5 L. Ed. 2d 492; *Pierson* v. *Ray* (1967), 386 U.S. 547, 87

Sup. Ct. 1213, 18 L. Ed. 2d 288; *Whirl* v. *Kern* (5th Cir 1968), 407 Fed. 2d 781; *Joseph* v. *Rowlen* (7th Cir. 1968), 402 Fed. 2d 367.

42 USCA, sec. 1982, is written in declaratory language setting forth the property rights of all citizens. *Jones* v. *Mayer Co., supra*, held that it bars *all* racial discrimination in the sale or rental of property. A refusal to sell or rent property to a person solely because of his color naturally results in a violation of sec. 1982, and a person making or assisting such a refusal should be responsible for such natural consequences.

While it cannot effect the present controversy, it is significant that the Fair Housing Act of 1968, 42 USCA, secs. 3603(b)(1), provides that after December 31, 1969, the sale or rental of single dwellings by real estate brokers, agents or salesmen shall be subject to the anti-discrimination provisions of the Act. Thus it appears as of the date of this opinion that discrimination because of a person's color or race in the sale or rental of property, including single family dwellings, is unlawful by the owner under 42 USCA, sec. 1982 (1866), and by the real estate broker, agent or salesman under the Fair Housing Act of 1968, 42 USCA, sec. 3601 *et seq.*

Respondent cites *Vargas* v. *Hampson* (1962), 57 Cal. 2d 479, 370 Pac. 2d 322. That case may be distinguished. That was an action by plaintiffs of Mexican ancestry against a real estate broker for injunctive relief based upon a California statute prohibiting discrimination in the rendering of services in all business establishments. The court sustained a special demurrer with leave to amend on the grounds that the complaint was uncertain and ambiguous in that it was not clear whether they were complaining of defendant's actions solely as they related to the conduct of his own business or as the agent of third parties. The court said a clarification was necessary because if the action

was against him as agent there was no allegation that he had the authority to complete the transaction; and if it was against him in the conduct of his own business, it contained inconsistencies because other facts alleged showed that he had rendered some services.

We now turn to a consideration of whether the Wisconsin Real Estate Examining Board had authority to revoke or suspend the Orth Agency license.

The examining board is not a court but an administrative agency created by the legislature and dependent upon the legislature for its existence and the scope of its activities. It has such authority and only such authority as has been given to it by the legislature or by its own rules adopted pursuant to legislative directive. Ch. 136, Stats., in the main, creates the board and proscribes and circumscribes its powers and duties.

There is no specific statute dealing with real estate brokers or agents forbidding racial discrimination, nor has the board enacted any rule forbidding it. Substitute Amendment 1, A., to Assembly Bill 413 (1965), attempted to create sec. 136.08(2) (km), Stats., to read:

> "Discriminated against any person because of race, color, creed, national origin or ancestry, in selling, leasing, subleasing, renting, showing or financing of real estate."

However, the Bill was not passed.

If the board is empowered to take any action its authority must be found in sec. 136.08(2)(i) or (k), Stats., which read:

> "The commission may also on its own motion, or upon complaint in writing, duly signed and verified by the complainant, and upon not less than 10 days' notice to the broker or salesman, suspend any broker's or salesman's license or registration if it has

reason to believe, and may revoke such license or registration as provided hereafter, if it finds that the holder of such license or registration has:

". . .

"(i) Demonstrated untrustworthiness or incompetency to act as a broker, salesman or cemetery salesman in such manner as to safeguard the interests of the public;

". . .

"(k) Been guilty of any other conduct, whether of the same or a different character from that specified herein, which constitutes improper, fraudulent or dishonest dealing."

The purpose of ch. 136, Stats., was discussed by the court in *Hilboldt* v. *Wisconsin R. E. Brokers' Board* (1965), 28 Wis. 2d 474, 481, 137 N.W. 2d 482, where it said:

"Ch. 136, Stats., Real Estate Brokers' Board, is a regulatory legislative enactment, under the police power, designed, primarily, to protect the interest of the general public. This history, as set out by the early cases, reveals that prior to the enactment of these regulatory statutes unscrupulous persons dealt in the buying and selling of real estate either for themselves or others in an unethical and fraudulent manner to such an extent that regulation, for the protection of the general public, became necessary.

"The statutes, as they now exist, provide that one cannot act as a real-estate agent, broker, or salesman unless he has a license issued to him by the state through the Real Estate Brokers' Board. Before a license can be issued the applicant must meet established qualifications as to education, knowledge

of real-estate law, and ethical character. The statute further charges the board with the responsibility of suspending or revoking a license when the holder has violated statutory standards."

Sec. 136.08 (2) (k), Stats., was discussed by the court in *Lewis Realty* v. *Wisconsin R. E. Brokers' Board* (1959), 6 Wis. 2d 99, 94 N.W. 2d 238, where the plaintiffs argued that the term "improper dealing" was too vague to provide any standard of conduct for brokers and therefore was unconstitutional. In construing the language of the section the court said, at p. 108:

> "However, it is the duty of this court to so interpret a statute as to uphold its constitutionality if this can be reasonably done without doing violence to the accepted rules of statutory interpretation. We believe that the context in which the word *'improper'* is used in sec. 136.08 (2) (k), Stats., rules out such rather all-inclusive meanings as those set forth in the above-quoted dictionary definition. The material words of such statute are 'other conduct . . . which constitutes improper, fraudulent, or dishonest dealing.' The word 'improper' has a more-comprehensive meaning than either "fraudulent' or 'dishonest.' Conduct which violates the moral code and takes an unfair financial advantage of another person with whom the actor deals, is a constituent part of both 'fraudulent dealing' and 'dishonest dealing.' In order to save the constitutionality of the statute we consider it necessary that the words 'improper dealing' as used in sec. 136.08 (2) (k) be restricted to conduct which involves moral culpability and which tends to take an

unfair financial advantage of the person with whom the actor is dealing. In other words, it must be closely akin to dishonest or fraudulent dealing."

Appellant admits that the construction is clear and conclusive is the word "and" was used in the conjunctive to mean that such improper dealing must be both morally culpable and tend to take unfair financial advantage of the person dealt with. However, he argues that the court actually intended to use it in the disjunctive so that either morally culpable acts or acts tending to take unfair financial advantage would be improper dealing as used in the statute.

A fair reading of the *Lewis Case, supra,* does not support appellant's argument. The court resorted to the associated words "fraudulent" and "dishonest" to resolve the meaning of "improper," and construed the phrase as a whole. The statement that improper dealing "must be closely akin to dishonest or fraudulent dealing" leads to the same conclusion. This also was the interpretation placed on that language in 54 Op. Atty. Gen. (1965) 31, 33, where it was stated: "In the *Lewis* case the court restricted the meaning of improper dealing to the taking of unfair financial advantage of the other party, . . ."

Sailer v. *Wisconsin R. E. Brokers' Board* (1958), 5 Wis. 2d 344, 92 N.W. 2d 841, held that a violation of a board rule may constitute "incompetency" under sec. 136.08 (2) (i), Stats. Except for *Sailer,* "untrustworthiness" and "incompetency" have not been defined within the meaning of that section. Trustworthiness and competency have been defined as they relate to the requirements for granting a license, and a review of those cases indicates that a broker must be trustworthy in a financial sense, and competent as defined in sec. 136.05 (2). *State ex rel. Progreso D. Co.* v. *Brokers Board* (1930), 202 Wis. 155, 231 N.W. 628; *State ex rel. Durham Corp.* v. *Brokers Board* (1927), 192 Wis. 396, 211 N.W. 292.

Appendix A

As an administrative agency of the state the board has only those powers which may be found to have been expressly granted, or must necessarily be implied within the four corners of the statutes under which it operates. *American Brass Co.* v. *State Board of Health* (1944), 245 Wis. 440, 15 N.W. 2d 27. The statutes under which the board operates, as well as this court's interpretation of those statutes, indicate that the power of the board under ch. 136, Stats., is to protect the public from dishonesty and incompetency by brokers in their fiduciary capacity. An extension of its power to discipline for racial discrimination would seem beyond its authority in the absence of enabling legislation. *State* v. *Grayson* (1958), 5 Wis. 2d 203, 92 N.W. 2d 772; *McKibbin* v. *Corp. & Sec. Comm.* (1963), 369 Mich. 69, 119 N.W. 2d 557; sec. 227.014 (2) (a), Stats. This position was taken by the attorney general in deciding that the board does not have power under existing law to discipline a broker for racial discrimination in the sale of property owned by the broker. Op. Atty. Gen. (1965) 31. The same reasoning seems applicable to the situation where the broker is acting as agent for the owner.

In addition, the fact that the legislature refused to adopt an anti-discrimination rule to apply to real estate brokers, agents or salesmen makes it clear that the legislature did not intend to give such authority to the examining board.[4]

We conclude that the examining board was without authority to revoke or suspend the real estate broker's license of the Orth Agency because of discrimination.

The appellant contends the failure of the examining board to revoke or suspend the license of Orth for racial

[4] In view of the decision of the United States Supreme Court in 1968 in *Jones* v. *Mayer Co.*, *supra*, and the Fair Housing Act of 1968 passed by Congress, the legislature may want to reconsider its position as to discrimination in the sale or rental of property.

discrimination constitutes state action within art. XIV, sec. 1 of the United States Constitution, and art. 1, sec. 1 of the Wisconsin Constitution.

Since it appears that the board presently does not have the authority to discipline a broker for racial discrimination, the question here would be whether the failure of the legislature to give it that power constitutes state action.

As both parties point out, there is language in *Reitman* v. *Mulkey* (1967), 387 U.S. 369, 374, 375, 87 Sup. Ct. 1627, 18 L. Ed. 2d 830, to the effect that a state may maintain a neutral position toward private racial discriminations:

> "Second, the court [California Supreme Court] conceded that the State was permitted a neutral position with respect to private racial discriminations and that the State was not bound by the Federal Constitution to forbid them. But, because a significant state involvement in private discriminations could amount to unconstitutional state action, *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, the court deemed it necessary to determine whether Proposition 14 invalidly involved the State in racial discriminations in the housing market.

There is no clear test for determining the distinction between neutrality and state action. Later, in *Reitman, supra*, the court said at p. 378:

> "This Court has never attempted the 'impossible task' of formulating an infallible test for determining whether the State 'in any of its manifestations' has become significantly involved in private discriminations. 'Only by sifting facts and weighing circumstances' on a case-by-case basis can a 'non-obvious involvement of the State in private conduct be attributed its true significance.' *Burton* v. *Wilmington Parking Authority*. . . ."

The language of the opinion goes on to indicate that the State Supreme Court is "armed" with knowledge of the facts and circumstances of the questioned activity, and must assess its potential impact in the milieu in which it will operate. In *Reitman, supra*, the Supreme Court affirmed the decision of the California Supreme Court which held invalid an amendment to that state's constitution popularly known as "Proposition 14."

In his brief appellant lists many of the cases which have found some form of state action involved in discriminatory practices. An examination of those cases shows that all of them involved discriminatory statutes or ordinances, or some positive action by public officials to enforce or encourage private discrimination. Clearly, the concept of what constitutes state action has been expanded to include many instances which were previously considered purely private. But no cases can be found to support the proposition that action by state licensees constitutes state action absent a showing of affirmative action by the state requiring or permitting such conduct, or of a relationship of such interdependence between the state and its licensees that the licensee's conduct can be said to be that of the state.

Though not clearly expressed, appellant's argument appears to be that the state has put itself in the position where it cannot maintain an attitude of neutrality toward private discrimination by brokers. Since the brokerage business is so involved with the public interest that the state has seen fit to regulate it, the refusal of the state to condemn a business practice is the equivalent of state ratification or approval of that practice.

The only authorities which can be found to support this argument are the concurring opinions of Justice Douglas in several civil rights cases. *See Garner* v. *Louisiana* (1961), 368 U.S. 157, 82 Sup. Ct. 248, 7 L. Ed. 2d 207; *Reitman* v. *Mulkey, supra*. But the majority of the court has not been willing to go this far.

Appendix A

The question of state action was considered by the Michigan Supreme Court in *McKibbin* v. *Corp. & Sec. Comm.*, *supra*, where that court held that the Michigan real estate licensing board was without power to make a rule prohibiting discrimination by brokers. It found that the failure of the state to affirmatively prohibit discrimination by brokers did not constitute state action within the meaning of the Fourteenth Amendment.

If the examining board had the authority to discipline for discrimination an arbitrary refusal to exercise that power could be said to be state action. But by narrowly defining the scope of the board's authority the state has succeeded in maintaining the neutrality allowed by the Supreme Court.

Even if the state action argument by the appellant could be accepted it is doubtful that any relief could be had in this action for the reason that it is simply a review of the activity of an administrative tribunal. If the state has unconstitutionally acted by the failure of the legislature to act, it would seem that the complainant must seek his relief through an action in court, either state or federal.

It is our opinion that the examining board was without authority to revoke or suspend a real estate broker's license because of racial discrimination and that it properly dismissed the appellant's complaint.

By the Court—Judgment affirmed.

APPENDIX B

(Opinion, Circuit Court of Dane County, Wisconsin, May 2, 1969)

SACHTJEN, *Judge*:

This is an action to review, pursuant to Chapter 227, Wis. Stats., an order made and entered by the Wisconsin Real Estate Examining Board dismissing petitioner's complaint against the "Bud" Orth Real Estate Agency.

It appears that the petitioner, Ray Ford, is a member of the Negro race, living at Racine, Wisconsin. Ellsworth C. "Bud" Orth is a real estate broker, duly licensed by the State of Wisconsin, doing business at 1680 Douglas Avenue, Racine, Wisconsin, under the name and style of the "Bud" Orth Agency. About December 8, 1966, a Mr. and Mrs. Donald McMahon listed their property at 2608 Pinehurst, Racine, Wisconsin, for sale with the Orth Agency. The listing agreement contained nothing which directed Orth as the agent for the owner not to show or attempt to sell the property to a Negro. The Board did find that, at the time of the execution of the listing agreement, McMahon instructed the salesman, Al Orth, that he would not show or sell his property to colored people. This unsolicited instruction was not made a part of the contract.

On March 6, 1967, petitioner Ford visited the Orth Agency and discussed with Ken Orth, a licensed salesman, the possibility of purchasing the McMahon property. Then Orth, in the presence of petitioner, placed a call to Mr. McMahon to inquire about showing the property to a Negro family. McMahon stated he would not show or sell his property to a Negro. On this basis, Ken Orth then declined to show the property to a petitioner. Subsequently, petitioner filed a complaint with the respondent Board on August 8, 1967.

Appendix B

This complaint asserts that Orth's course of conduct towards Ford constituted racial discrimination under Wis. Stats. section 101.60(1)(b) and "incompetency and improper conduct" within the meaning and intent of section 136.09(2), Wis. Stats., and that the continued licensing of Orth as a real estate broker by a state agency, notwithstanding his discrimination, incompetency, and improper conduct, violated the equal protection guaranteed Ford by the U.S. constitution and the inherent rights guaranteed him by the Wisconsin constitution.

It should be noted at this juncture that the duties of the Real Estate Broker's Board prescribed in section 136.04 (2)(a), Wis. Stats., include the receipt of applications for and the issuing of licenses to real estate brokers and salesmen to administer Chapter 136. The Board is empowered to revoke the license of any broker or salesman upon a complaint in writing and after a hearing thereon upon certain specified statutory grounds. The complaint here cites two of such grounds for revocation and contends that Orth has (1) demonstrated untrustworthiness or incompetency to act as a broker or salesman in such manner as to safeguard the interest of the public, contrary to section 136.09(2)(i); and (2) been guilty of conduct, whether of the same or of a different character from that specified therein which constitutes improper, fraudulent or dishonest dealing, contrary to section 136.09(2)(k).

After a hearing, the Board made its finding and determination thereon. It arrived at the following conclusion of law:

> "That in refusing to show the McMahon property to the complainant Ford, the 'Bud' Orth Agency was acting as agent, under explicit instructions of the principal McMahon, and was not guilty of discrimination constituting improper conduct and did not demonstrate incompetency in violation of sections 136.09(2)(i) or (k) of the Wisconsin Statutes. . . ."

The Board then dismissed the complaint, prompting the appeal to this court.

Initially, the petitioner appears to contend that the findings and conclusions of the Board are erroneous and not supported by substantial evidence in view of the record as a whole. This offense is not precisely formulated, and the court is unable to ascertain with specificity exactly which findings are under attack. The court has, however, carefully examined the findings in the light of the proper standard of judicial review. It is well established that the court must determine whether or not the questioned findings are supported by substantial evidence in view of the entire record. Substantial evidence as so used means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and this test is to be applied to the evidence as a whole, not merely to that evidence which supports the findings of the agency. *Kenosha Teachers Union* v. *Wis. E. R. Comm.*, 39 Wis. 2d 196. The Board's decision, in my opinion, is adequately supported by substantial evidence.

The main thrust of petitioner's argument is that the Board's decision was contrary to law. He asserts that the Board ought to have found the Orth Agency guilty of discrimination, incompetency or improper conduct for its refusal to show the McMahon property to Ford. This argument provokes the inquiry whether or not the Board was empowered to revoke a broker's license for an act of discrimination on account of race.

The statutes authorize the Board to revoke a broker's license for any reason which would have justified denial of a license in the first instance and for the express reasons enumerated in section 136.08 (2), Wis. Stats. Nowhere has the legislature provided for revocation of a broker's license for engaging in discriminatory practices unless such conduct falls within the purview of subsections (i) and (k) as alleged by the petitioner.

Appendix B

In *Lewis Realty* v. *Wis. R. E. Brokers Board*, 6 Wis. 2d 99, the court restricted the meaning of the phrase "improper dealing" contained in section 136.08 (2) (k) to the taking of unfair financial advantage of the other party. This decision holds that improper dealing covers only conduct including moral culpability and tending to take an unfair advantage of the broker's client.

In 55 O.A.G. 31 (1965), the attorney general, in reliance upon the *Lewis* case, supra, opined in response to a question from the Board that "improper dealing" did not include racial discrimination, nor was racial discrimination covered by the phrase "demonstrated untrustworthiness or incompetency" contained in sections 136.08 (2) (i), citing *State ex rel. Durham Corp.* v. *Brokers' Board* (1927), 192 Wis. 396. He concluded first that there was no statutory authority for the Board to suspend or revoke the license of a broker for discrimination, nor was there sufficient statutory authority to allow the Board to promulgate such a rule.

In the 1965 legislative session, a bill was proposed which would have amended section 136.08 (2), Wis. Stats., to provide that the license of a broker or salesman could be revoked for this reason; however, it was not adopted. This would indicate that, at present, discrimination is not a ground for revocation or suspension under the statute. This court must, therefore, conclude that the Board's decision in this respect was correct under the present law.

The more serious question raised by petitioner in his contention that the State of Wisconsin, through the respondent board in administering chapter 136 and its licensees thereunder, is sanctioning racial discrimination contrary to the Fourteenth Amendment. Support for this argument comes from the decision in *Reitman* v. *Mulkey*, 18 L. ed. 2d 830 (1967). In this case the Supreme Court of the United States sustained a judgment of the California Supreme Court that Article I, Section 26, of the

California Constitution denied to persons the equal protection of the laws within the meaning of the Fourteenth Amendment. The purpose of "Proposition 14," as the California Constitutional Amendment has been popularly labeled, was said by the California Court to "overturn state laws that bore on the right of private sellers and lessors or discriminate" and "to forestall future state action that might circumscribe this right." The Federal Court concluded: ". . . that the (California Constitutional Amendment) would encourage and significantly involve the state in private racial discrimination contrary to the Fourteenth Amendment."

The concept of what constitutes prohibited state action has never been extended to embrace action by state licensees. None of the cases in this area decided to date hold that a state licensee's discrimination violates the Fourteenth Amendment. In fact, the Michigan Court dealt with a practically identical situation in *McKibbin v. Michigan Corporation and Securities Comm.* (1963), 369 Mich. 69, 119 N.W. 2d 357, and the Court held that the Michigan real estate licensing board was without power to make a rule prohibiting discrimination under a statute similar to Wisconsin's.

All of the federal cases dealing with what constitutes state action cited by petitioner are concerned with affirmative state conduct. None of these cases involve acts of private discrimination, as present here, which are not proscribed by the Fourteenth Amendment.

The court is constrained to hold that the Board's decision is supported by substantial evidence, is made according to law, and must be affirmed. Respondent's counsel may draft an appropriate judgment from the court's signature.

APPENDIX C

(Opinion, Wisconsin Real Estate Examining Board, May 14, 1968)

The above entitled matter having come on for hearing before the Wisconsin Real Estate Examining Board, on September 18, 1967 at 9:30 A.M. in the County Board Room, Racine County Courthouse, Racine, Wisconsin, before Board members, H. E. Gilbert, M. Wm. Gerrard, and Robert E. Stahl; Roy E. Hays, Director of the Board present, and Alvin M. Tandberg, attorney appearing for the Board; the complainant, Ray Ford, appearing in person and by Adrian P. Schoone and Theodore W. Harris, attorneys; and the respondent, "Bud" Orth, appearing in person and by James J. Fetek, attorney; the complainant's testimony having been taken and respondent's motion to dismiss having been granted by the Board; and thereafter said matter being reopened pursuant to stipulation and hearing resumed at the Racine County Courthouse, Racine, Wisconsin on March 18, 1968 at 9:30 A.M., before Board members M. Wm. Gerrard, Robert E. Stahl and Randall B. Brunson, all other appearances being the same as at the original hearing, and Board members having given due consideration to the records and exhibits, the Board now makes and determines as and for its

Findings of Fact

1. That complainant Ray Ford is a member of the Negro race, residing at 2041 Center Street, Racine, Wisconsin;

2. That respondent, Ellsworth C. "Bud" Orth, is a real estate broker, having been so licensed by the State of Wisconsin, since October 18, 1949, doing business as the "Bud" Orth Agency at 1680 Douglas Avenue, Racine, Wisconsin;

Appendix C

3. That on or about December 8, 1966, Donald and Joanne McMahon, listed their property at 2838 Pinehurst, Racine, Wisconsin, for sale with the "Bud" Orth Agency, through Al Orth, a licensed real estate salesman for the "Bud" Orth Agency;

4. That at the time of executing said contract, said Donald McMahon orally instructed Al Orth that he would not show or sell the property to colored people;

5. That on advice of counsel this instruction was not written into said listing contract;

6. That these instructions were not solicited by said Al Orth;

7. That on or about March 6, 1967, the complainant, Ray Ford, visited the "Bud" Orth Agency, and discussed with Ken Orth, a licensed salesman for the "Bud" Orth Agency, the possibility of purchasing the McMahon property;

8. That said Ken Orth, in the presence of the complainant, called McMahon to inquire if he could show the home to a colored family, and was again advised by McMahon that he would not show or sell to colored;

9. That the "Bud" Orth Agency, through salesman Ken Orth, as agent for, and acting on instructions from the principal, Donald McMahon, thereupon refused to show the property to the complainant, Ray Ford;

Conclusions of Law

1. That in refusing to show the McMahon property to the complainant Ford, the "Bud" Orth Agency was acting

as agent, under explicit instructions of the principal McMahon, and was not guilty of discrimination constituting improper conduct and did not demonstrate incompetency in violation of Sections 136.08(2)(i) or (k) of the Wisconsin Statutes;

THEREFORE, IT IS ORDERED that the above entitled matter be, and the same is hereby dismissed.

Dated this 14th day of May, 1968 at Milwaukee, Wisconsin.

WISCONSIN REAL ESTATE EXAMINING BOARD

By: M. William Gerrard
M. WM. GERRARD

By: Robert E. Stahl
ROBERT E. STAHL

By: R. B. Richardson
RANDALL RICHARDSON

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1205

RAY FORD,

Petitioner,

v.

WISCONSIN REAL ESTATE
EXAMINING BOARD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

JOHN C. FRITSCHLER, JR.
222 South Hamilton Street
Madison, Wisconsin 53703

CHARLES E. PELLINO, JR.
222 South Hamilton Street
Madison, Wisconsin 53703
Attorneys for the Respondent

WILLIAM F. EICH
Assistant Attorney General
Wisconsin State Capitol
Madison, Wisconsin
Of Counsel

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No.

RAY FORD,

Petitioner,

v.

WISCONSIN REAL ESTATE EXAMINING BOARD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

Respondents pray that the petition for a writ of certiorari to review the judgment of the Supreme Court of Wisconsin entered in the above-entitled cause on October 9, 1970, be denied.

CORRECTION AND AMPLIFICATION OF THE STATEMENT OF FACTS

The record does not bear out appellant's contention at page 4 of his brief that it was upon the advice of his attorney that the Orth Agency did not include McMahon's instruction not to sell to black people in its listing contract with McMahon (R. 111).

The Orth Agency did not maintain a separate card file on listings on which notations regarding racial restrictions were kept at the time the McMahon property was listed with the Orth Agency (R. 118, 120, 356-58). The notation as to Ford's color was placed not on a card relating to the McMahon property, but on a card of the type filled out for all prospective purchasers (R. 120).

Earl Zarbock stated that he had not been employed by the Orth Agency since August of 1966, and that he had no idea of what the Orth Agency practices had been since he had left (R. 382, 386). He further testified that he never solicited any instructions from owners not to sell to colored and that it wasn't necessarily a policy of the Orth Agency to solicit such instructions (R. 383, 384). As to racial restrictions, Zarbock stated, the broker would go according to what the owner might instruct him to say, that is, what the owner wanted him to do (R. 378). Mr. Zarbock stated further that he never received any instructions from Bud Orth not to sell to a colored family in an area where there were as yet no black families (R. 379, 380).

Reasons for Denial of the Writ

1. The petitioner asks this Court to consider whether the State of Wisconsin, through its Supreme Court, its Real Estate Commission and its legislature, has engaged in conduct proscribed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Pet. 2)[1]

We submit that the decision of this Court in Jones v. Mayer Co., 392 U.S. 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968), and Congressional enactment of 42 U.S.C. §§3601 et. req. make consideration of the merits in this case unnecessary and that to grant certiorari in such circumstances would be improvident.

The landmark decision in Jones vs. Mayer, supra, of course held that 42 U.S.C. §1982:

> "...bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment." (p. 413)

The sweep of that language leaves no doubt, in our view, that private racial discrimination by a real estate broker would be proscribed. The Supreme Court of Wisconsin so indicated in its decision below. (Pet. App. p. 12a). At any rate, 42 U.S.C. 3603 (b) (1) now specifically prohibits such private discrimination by brokers.

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[1] The following abbreviations are used throughout this brief: Pet. - Petitioner's Brief; Pet. App. - Petitioner's Appendix.

Petitioner does not allege the existence of a statute which requires unjustified discrimination nor does he allege discriminating governmental administration of a statute fair on its face. Rather, throughout his brief petitioner repeatedly alleges the existence of a state action which has the effect of promoting or permitting private discrimination. However, with private discrimination itself now illegal in the sale or rental of property, state action of the type alleged here, which was formerly proscribed, is now in fact impossible. That is, state action which is said to promote or permit private discrimination by brokers in the sale or rental of housing is no longer possible because such private discrimination is now illegal under Federal law.

Because such state action is no longer possible, the previous value of the "state action" argument as a theory for the elimination of private discrimination in housing has become valueless. Indeed, much more powerful and satisfactory tools for the accomplishment of that end are now in existence. Just as in Jones v. Mayer, supra, future courts will not bother with the indirect and piecemeal state action theory where a violation of either 42 U.S.C. §1982 or 42 U.S.C. §§3601 et. seq. is evident.

For these reasons no issue of public importance can be said to have existed at the time petitioner filed his petition for certiorari in this Court. The words of Mr. Justice Harlan, dissenting in both Jones v. Mayer, supra, at p. 479 and Sullivan v. Little Huntington Park, 396 U.S. 229, at p. 250, 90 S. Ct. 232, 83 L. Ed. 2d 386 are particularly relevant here:

"This Court's certiorari jurisdiction should not be exercised simply 'for the benefit of the particular litigants,' Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955) but instead for the 'settlement of [issues] of importance to the public as distinguished from...the parties,' Layne and Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)."

2. It is true that this Court did exercise its certiorari jurisdiction in both Jones v. Mayer Co., supra, and Sullivan v. Little Huntington Park, supra, so as to grant those petitioners the relief they had sought below under §1982. In those cases the petitioners sought injunctive relief, damages, or both, for redress of acts of private discrimination practiced against them in the sale or rental of housing. The case at bar, however, contains no such compelling element. No damages or injunctive relief are sought here. Thus, what possible interests of the parties or the public would be served by a decision on the merits? The petitioner does not seek any relief here which would compensate him for discriminatory acts or ensure him the acquisition of the home he sought to purchase. Nor would a finding of state action provide him with such relief.

What must be obvious to all is that the petitioner is seeking to remove from the social milieu a type of private racial discrimination which has operated in urban areas to create a white wall around the ghetto. We have already shown that this wall has been breached by a new federal statute and by this Court's construction of an old one.

In view of these recent developments, great difficulties would be raised by a decision on the merits in this case. Petitioner's charges of "state

action" could then only be viewed upon the assumption that the states have a positive duty to provide remedies for or prohibitions against private racial discrimination in housing which exceed those given on the Federal level. Namely, the revocation of the license of a broker who has discriminated. There is no authority for such an assumption. To the contrary, the great weight of authority indicates that the states have no duty to legislate against private racial discrimination. The Fourteenth Amendment upon which petitioner relies is merely prohibitory. To be sure, as petitioner points out, there is some indication that inaction by a state which has the effect of promoting or permitting private discrimination may be considered state action proscribed by the Fourteenth Amendment. In our minds the allusion to "state neutrality" in Reitman v. Mulkey, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967), makes such authority unclear for the moment. However, petitioner's view of state action goes far beyond even the "neutrality" position. He would have this Court expand the "state action" theory in such a manner as to completely rewrite the Fourteenth Amendment. The obvious impact of such a decision in fields other than racial discrimination in the sale and rental of housing mitigate strongly against granting certiorari here.

3. Petitioner alleges that the Supreme Court of Wisconsin "failed to recognize an established Federal right and implicated the State in conduct proscribed by the Fourteenth Amendment and by 42 U.S.C. §1982." (Pet. 7). The fact is that the Wisconsin Supreme Court found a probable violation of §1982 (Pet. App. A p. 12a). Is the Wisconsin Supreme Court to blame because petitioner neglected to seek his remedy under §1982 against the broker? We think not. Furthermore, we see

nothing in Jones v. Mayer, supra, in §1982 itself, in the 1968 Fair Housing Act or in other decisions of this Court which conflicts with the decision of the Wisconsin Supreme Court. We know of no established Federal right the violation of which affords the remedy sought by the petitioner. In view of the Wisconsin Supreme Court's awareness of the existence and application of §1982, it cannot be said to have failed to recognize petitioner's established federal right. Petitioner's own expanded view of "state action" has led him to reason that the lower Court's failure to revoke the license or find authority for that purpose in Wis. Stat. 135.08 (2) is necessarily in conflict with a right under §1982, the Fourteenth Amendment, or the decisions of this Court. Yet petitioner expressly concedes, despite extensive citation of the "state action" cases, that there is no judicial authority in existence which creates a conflict with the decision of the Wisconsin Supreme Court in this case. We reiterate that the Fourteenth Amendment, §1982, the Fair Housing Act of 1968, or the decisions of this Court, do not impose any duty upon the states to create prohibitions or remedies in excess of those provided by existing federal law.

Sullivan v. Little Huntington Park, supra, relied upon at Pet. 15, does not stand for the proposition that state courts, administrative agencies or legislatures have a duty to provide the type of remedial action asked by the petitioner in this case. There it was held that damages and injunctive relief are available to redress violations of §1982. Petitioner seeks no such relief here nor has he at any time sought to gain redress directly from those who discriminated against him. Nor does Colorado Anti-Discrimination Commission v. Case, 151 Colo. 235, 380 P. 2d 34, 40 (1962) at Pet. 17, 18 stand

for any such proposition. In fact, that Court, in striking down a portion of the Colorado Fair Housing law stated at p. 250:

> "The legislature cannot delegate to any administrative agency "carte blanche" authority to impose sanctions or penalties for violation of the substantive portion of a statute." (emphasis added)

We feel that such restrictions are applicable to state courts also where a court would, in effect, "create" a sanction or penalty not contemplated by a statute or the common law.

Petitioner relied below on Wis. Stat. sec. 101.60 to show he had been discriminated against by the broker, yet he failed to invoke that statute as a basis for relief. Instead, he sought to use sec. 101.60 as grounds for a claim that the broker's license should be revoked under Wis. Stat. sec. 136.08 (2). Chapter 136 of the Wisconsin Statutes nowhere mentions racial discrimination, while 101.60 (3) provides that the provisions of 101.60 shall be administered by the Department of Industry, Labor and Human Relations.

Instead of seeking relief under 101.60 before the Department of Industry, Labor and Human Relations, petitioner went to the Real Estate Commission. Now that the Real Estate Commission and the Supreme Court of Wisconsin have failed to find authority in Wis. Stat. §136.08 (2) to grant the relief he seeks, petitioner claims state action which is proscribed.

We submit that such a claim is not properly raised here. Petitioner has failed to seek the relief available to him in the proper forum below under §101.60 (2) (a) and (b) and §101.60 (7). Both 136.08 (2) and 101.60 (6) expressly provide only criminal sanctions so that the petitioner cannot be heard to say that remedies under 101.60 (6) are inadequate or that any possible remedy under 136.08 (2) is more appropriate. It has been held in other states that damages are available for the violation of state statutes, like §101.60, dealing with civil rights but which expressly provide only criminal sanctions. Amos v. Prom, Inc., 117 F. Supp. 615 (D.C. Iowa, 1954); Powell v. Utz, 87 F. Supp. 811 (D.C. Wash. 1949); Bolden v. Grand Rapids Operating Corp., 239 Mich. 318, 214 N.W. 241 (1927); Ferguson v. Gies, 82 Mich. 358, 46 N.W. 718 (1890); Everett v. Harron, 380 Pa. 123, 110 A.2d 383 (1955). Yet petitioner did not assert such a cause of action below. Thus, petitioner cannot raise the state action argument so as to force a remedy not contemplated by the statute relied upon by the common law.

Furthermore, the Wisconsin Supreme Court was fully aware that the result of its decision could not involve the State of Wisconsin in the sanctioning of continued private racial discrimination by real estate brokers because it was armed with the knowledge that Jones v. Mayer Co., supra, and 42 U.S.C. §§3601 et. seq. have made such a result impossible.

4. Because the Wisconsin Supreme Court clearly found the Real Estate Commission to be in error as to the actual existence of racial discrimination, the portion of the petitioner's argument dealing with the Commission's findings on that issue are clearly irrelevant. All that need be considered is what the Commission could have done had it found discrimination.

First of all, the petitioner does the Commission a grave disservice by its charge of naivete (Pet. 20). The Commission was indeed aware of this problem, and in 1965 it asked the Attorney General of Wisconsin for his advisory opinion on three questions: (1) Whether 136.08 (2) Wis. Stats. gave the Commission the power to revoke a broker's license for racial discrimination? (2) If not, could the Commission itself formulate such a rule? (3) If neither, would failure to revoke for racial discrimination constitute "state action" proscribed by the Fourteenth Amendment? The Attorney General answered all three questions in the negative. 54 Wis. Ops. Att'y. Gen. 31 (1965). The Commission was under this constraint when the instant case was presented to it. Under the circumstances the problem was obviously one for the courts or the legislature to decide. Thus, it is just as probable that the Commission acted in the manner it did to ensure judicial review of the case in hopes that the state courts would interpret the statute differently, than on any theory that it believed at the time that it had such authority as petitioner suggests (Pet. pp. 9, 20).

Secondly, it has already been shown generally why no useful purpose would be served by a decision on the merits in this case. To reiterate, the issue in this case has become one of isolated significance, the deciding of which would merely resolve a problem between the parties and which as to the public in general has already been settled. In addition, a finding for petitioner on the issues he has presented for consideration can in no way fulfill the expectations he had of purchasing the particular home he was denied, nor could he be given damages or in any other way be made whole by such a finding.

5. We feel that the arguments heretofore presented regarding mootness apply equally to the specific allegations which petitioner has advanced with regard to the Wisconsin legislature. For those reasons we do not feel that the Legislature is "vulnerable" as petitioner suggests (Pet. p. 23). The footnote of the Wisconsin Supreme Court there quoted does not indicate that the Court feels Wisconsin "vulnerable". It is merely a suggestion that as a matter of desirable social policy the Legislature may wish to bring the state law of Wisconsin into conformity with existing Federal law on the subject of private discrimination in the sale and rental of housing. There is no suggestion that Wisconsin need exceed the scope of Federal law by creating in the Real Estate Commission the power to revoke the license of a broker who discriminates.

CONCLUSION

Wherefore, for the reasons herein above stated, it is respectfully submitted that the petition should be denied.

JOHN C. FRITSCHLER, JR.
222 South Hamilton Street
Madison, Wisconsin 53703

CHARLES E. PELLINO, JR.
222 South Hamilton Street
Madison, Wisconsin 53703

Attorneys for the Respondent

WILLIAM F. EICH
Assistant Attorney General
Wisconsin State Capitol
Madison, Wisconsin
Of Counsel

CERTIFICATE OF SERVICE
SUPREME COURT OF THE UNITED STATES

October Term, 1970

No.

RAY FORD,

Petitioner,

against

WISCONSIN REAL ESTATE
EXAMINING BOARD,

Respondent.

William F. Eich, a member of the bar of this court, does hereby certify that copies of the above entitled Brief in Opposition to Petition for a Writ of Certiorari were served on Theodore W. Harris, 1633 Racine Street, Racine, Wisconsin, Adrian P. Schoone, 220 Ninth Street, Racine, Wisconsin and Nathaniel R. Jones, 1790 Broadway, New York, New York 10019, by depositing the copies in the United States mails, prepaid, air mail special delivery, addressed to them, as set forth above, on March 3, 1971.

William F. Eich
Assistant Attorney General
Wisconsin State Capitol
Madison, Wisconsin
Of Counsel

John C. Fritschler, Jr.
222 South Hamilton Street
Madison, Wisconsin
Attorney for the Respondent